IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 37 OF 1990.

WITH

CRIMINAL APPEAL NO. 87 OF 1990

AND

CRIMINAL APPEAL NO. 88 OF 1990

Cr.Appeal No.37/90.

1. Ramesh Parshuram Patil.
2. Suresh Kashinath Deo.
3. Devanand Shankar Vaidya @ Vaiti.
4. Raju Ramchandra Vaiti.
5. Tukaram @ Bal Sadashiv Mayekar. ... Appellants
6. Ranjan Eknath Pawar. (Org.Accused No. 1 to 6.)

Versus.

1. The State of Maharashtra
   (At the instance of Mahim
   Police STation C.R.No.797/82).

2. Kum.Kalpana Laxman Dhamankar,
   Fisherman Colony, Bldg.No.9,
   R.No.347, Mahim, Bombay-16. ... Respondents

Shri Sandesh D.Patil, Advocate (appointed) for the Appellants.

Shri U.V.Nikam, A.P.P. for the Respondent No.1-State.

Mrs.N.Bhagwat for Respondent No.2.

Cr.Appeal No.87/90.
and
Cr.Appeal No.88/90.

The State of Maharashtra. ... Appellant.
(In both appeals)

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Shri U.V.Nikam, A.P.P. for the Appellant in both appeals.

Shri Sandesh D.Patil, Advocate (appointed) for the Respondents in both appeals.

CORAM : ABHAY S. OKA, J.

DATED : 29th September, 2006.
3rd October, 2006,
4th October, 2006,
and
5th October, 2006.

ORAL JUDGMENT.

1. These three Appeals can be conveniently disposed of by a common judgment. Criminal Appeal No.37 of 1990 is filed by the original Accused for challenging the Judgment and order dated 16th January 1990 passed by the learned Additional Sessions Judge, Mumbai. By the said Judgment and order the Appellants have been convicted for offences punishable under sections 307, 376 and section 201 read with section 511 of the Indian Penal Code. The conviction is as regards the offences where the victim is the prosecutrix Ms.Kalpana Laxman Dhamankar. So far as the offence alleged against the

prosecutrix Ms.Smita alias Prachi Prakash Waradkar is concerned, the Appellant No.1 and the Appellant No.6 have been acquitted of the offences alleged under section 366 and 376 of the IPC. The Appellants have been sentenced to suffer R.I. for 7 years for the offence punishable under section 307 of the Penal Code and to pay fine of Rs.500/- each. In default of payment, the Appellants have been directed to undergo R.I. for four months. For the offence under section 376 of the Penal Code, the Appellants have been sentenced to suffer R.I. for 7 years and to pay of Rs.300/- each. In default of payment of fine, the Appellants have been directed to suffer R.I. for two months. For the offence under section 201 read with section 511 of the Penal Code, the Appellants have been sentenced to suffer R.I. for six months. All sentences have been directed to run concurrently. Criminal Appeal No.87 of 1990 has been filed by the State seeking enhancement in the sentence awarded to the Appellants. Criminal Appeal No.88 of 1990 is also preferred by the State for challenging the order of acquittal for offences alleged where the victim was Ms.Smita alias Prachi.

2. Initially in these three Appeals, the accused

were represented by Shri V.L.Pradhan, Advocate. When these Appeals were called out for final hearing before this Court on 16th August 2006, the office noting showed that Court notices issued to the accused were duly served. The notices were issued as Shri V.L.Pradhan was no longer appearing. Though the accused were served with notice, they had not engaged any Advocate. Therefore, this Court directed the office to appoint an Advocate for espousing the cause of the Accused. Accordingly, Shri S.D.Patil has been appointed as an Advocate.

3. I have heard the submissions of the learned Counsel appearing for the Accused who has been appointed to espouse the cause of the Accused. I have also heard the submissions of the learned A.P.P and the submission of the learned Counsel appearing for the 2nd Respondent Ms.Kalpana in Criminal Appeal No.37 of 1990. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to briefly refer to the prosecution case.

4. By the impugned Judgment and order two cases, viz. Sessions Case No.365 of 1983 and Sessions Case No.366 of 1983 have been decided. According to the case

of the prosecution, all the Accused are residing in and around the area of Fishermen Colony at Mahim. One of the victims, Kalpana Dhamankar was residing in Building No.9 in the said Colony along with her mother and sisters. The second victim Smita was also living in the same colony. Kalpana and Smita were close friends. According to the case of the prosecution, both of them knew the Accused as they used to frequently visit the house of one Gotya who was residing in Building No.9 in the said colony. According to the prosecution, the incident had taken place late in the night on 24th October 1982 or in the early morning of 25th October 1982. Eight days prior to the incident, the said Kalpana and Smita had gone to witness Ram Leela programme at Shivaji Park, Dadar, Mumbai. At that time, the Accused No.1 Ramesh and Accused No.4 Raju were present in the crowd. From Shivaji Park, the Accused No.1 Ramesh took Smita with him and Kalpana started going back towards her home. Accused No.4 Raju followed her and intercepted her near Vivekanand Garden. It is alleged that Accused No.4 proposed Kalpana and requested her to marry with him. However, Kalpana informed him that she was treating him as his brother and therefore, she did not accept the proposal. Thereafter Kalpana proceeded towards her home.

5. On 24th October 1982, Kalpana and Smita together went to see a programme of Garba dance in the Police Quarters in the Fishermen Colony. They witnessed the programme till about 11.15 p.m. when they noticed Accused No.4 Raju in the crowd. Therefore, they decided to return to their respective houses and they started running towards their building. When they were near Building No.17 and 23 which are adjacent buildings, they saw the accused No.1 Ramesh and the accused No.4 Raju. As both of them were frightened, they tried to hide themselves below the staircase of building No.17. According to the case of the prosecution, the Accused No.1-Ramesh and the Accused No.4-Raju followed them. The Accused No.1-Ramesh caught hold of Smita and took her towards Building No.23. Accused No.4-Raju took Kalpana to the terrace of Building No.17 where he again proposed her. But the said Kalpana turn down the proposal. Therefore, Accused No.4-Raju gave a threat to Kalpana. While all this was going on, the other Accused entered the terrace of Building No.17. According to the prosecution case, they removed the clothes on the person of Kalpana and pushed her down on the floor of the terrace. Thereafter, the accused forcibly raped Kalpana one after the other in succession. Kalpana was

thereafter thrown down by them from the terrace of the Building No.17. Kalpana fell down on the ground and sustained serious injuries.

6. According to the prosecution case, the Accused No.1-Ramesh and Accused No.6-Ranjan committed rape on Smita on the rear side of the building No.23 in an empty space between Building No.25 and a wooden stall.

7. P.W.3 Shri Ali Abdul Ali Barodawala, a resident of the building No.23 in the said colony heard a noise when Kalpana fell down on the ground and therefore, he rushed to the spot in front of Building No.17. He found that Kalpana was lying on the ground in an injured condition and she was unable to talk. He, therefore, shouted for help and rushed to the Police Station at Mahim. P.I. Patil and S.I.Shaikh along with other staff members came to the spot and they immediately shifted Kalpana to KEM Hospital. While Kalpana was being admitted in KEM Hospital, her mother Savitribai and sister Asha were brought to the Hospital. Thereafter P.I. Patil and P.S.I. Shaikh, Kalpana’s mother Savitribai and Kalpana’s sister Asha came back to the spot of incident i.e. Building no.17 in Fishermen Colony. In the meanwhile, the Accused No.1-Ramesh and

Accused No.2-Suresh were already arrested by the Police who were on the spot of the incident. A panchanama of the spot and a panchanama of the terrace of the Building No.17 was drawn. Another panchanama of the spot where prosecutrix Smita was subjected to offence was drawn and the clothes and certain articles were seized in presence of panchas. The prosecutrix Smita was taken to the Police Station where her statement was recorded and an offence under sections 366 and 376 of the Penal Code was registered vide C.R.No.796 of 1982. PSI Shaikh was making enquiry on the spot. The statement of PSI Shaikh was recorded by PI Patil and on that basis offence under sections 366, 376, 307 and 201 of the IPC was registered against all the Accused vide C.R.No.797 of 1982.

8. Statement of the prosecutrix Kalpana was recorded on 27th October 1982. Though PI Patil was making efforts to record statement of Kalpana in KEM Hospital where she was being treated, only on 27th October 1982 that he succeeded in recording the statement of Kalpana after the Doctor certified her fitness and ability to make such a statement. In her statement, Kalpana narrated the entire incident regarding the rape and attempt to commit murder. The statement of various witnesses were recorded. The

learned trial Judge after considering the evidence has convicted the Appellants in Criminal Appeal No.37 of 1990 for the offence against Ms.Kalpana and acquitted the accused for the offence against Ms.Smita.

9. Shri S.D.Patil, the learned Counsel has taken me through the notes of evidence and other material on record. He pointed out that there were two separate First information reports registered. C.R.No.796 of 1982 was in the case of an offence where the victim was Smita and the second one i.e. C.R.No.797 of 1982 was in respect of the offence where Kalpana was the victim. He pointed out that the FIR No.797 of 1982 was registered on the basis of the statement of PSI Shaikh. He pointed out that neither Shri Shaikh was examined as a witness nor a copy of the C.R.No.797 of 1982 was produced and proved which was the basis of the case of the prosecution. He submitted that PSI Shaikh who was the first informant in the FIR was not examined. He submitted that no material was produced on record to show that copies of both the first information reports were forwarded to the concerned Judicial Magistrate. He submitted that a strong adverse inference will have to be drawn on account of the failure of the prosecution not only to produce and prove the FIR No.797 of 1982 but

also for not examining PSI Shaikh who was a very important witness and who could have thrown light on the factual position. He submitted that these defects in prosecution case go to the root of the matter. He submitted that there could not have been investigation of the offence against Kalpana unless a F.I.R. was registered. He submitted that no evidence has been led to show that such F.I.R. was registered. He submitted that if F.I.R. would have been really in existence, the prosecution could have produced the acknowledgement showing that the same was received by the concerned Magistrate.

10. He submitted that the registration of FIR was sine qua non for investigation of an offence and a serious doubt has been created regarding the existence of the FIR. He submitted that as the FIR itself was not produced and proved, there was no foundation for the prosecution case. He submitted that this was a case for drawing strong adverse inference for non-examination of P.S.I.Shaikh. He submitted that this was a case where the prosecution has made an attempt to withhold the evidence of an important witnesses from the Court.

11. He pointed out several discrepancies and

contradictions in the evidence of the prosecutrix Kalpana. He submitted that apart from the serious infirmities regarding non-production of FIR and non-examination of S.I. Shaikh, the said Smita turned hostile and did not supported the prosecutrix Kalpana.

12. He pointed out that there were major contradictions in the prosecution case regarding the existence of sufficient light on the terrace. He pointed out that on the one hand the prosecution was contending that there was adequate light on the terrace but on the other hand the evidence of the prosecution witnesses suggests that for the purpose of recording panchanama torches were required to be used. He submitted that considering the past conduct of Kalpana, the entire incident was highly improbable. He submitted that considering the serious infirmities in the prosecution case, a serious doubt is created about the genuineness of the prosecution case. He submitted that on this ground alone it was unsafe to base the conviction on the sole testimony of the prosecutrix. He submitted that as the investigation was defective, the accused persons were entitled for an order of acquittal. He submitted that offence under section 307 was not established as no clear role has been ascribed in the

said office to each accused. He placed reliance on the several decisions. I will refer to the said decisions in the later part of this judgment.

13. The learned Counsel for the Respondent No.2 has placed reliance on various decisions of the Apex Court and submitted that in a case of an offence of this nature
the investigating officer should have shown utmost care and sensitively. She submitted that in view of the recent decisions of the Apex Court, even a corroboration is not required to the testimony of the prosecutrix. She submitted that the accused persons cannot rely upon some minor contradictions or lacuna of trifle nature unless substratum of the prosecution case is affected. She submitted that the law laid down by the Apex Court is that the conviction for an offence under section 376 can be based on the uncorroborated testimony of the prosecutrix. She submitted that in case of a trial for an offence under section 376 of the Penal Code, all unnecessary technicalities are required to be kept aside. She submitted that considering the heinous nature of the crime, in fact a case for enhancement of substantive sentence as well as fine is made out.

14. The learned A.P.P relied upon certain decisions. The learned A.P.P in support of the Appeal against acquittal pointed out relevant documents and depositions on record. He submitted that though prosecutrix Smita did not fully support the prosecution, the F.I.R. was duly proved and there was enough evidence to connect the accused with the offence against the said Ms.Smita. He submitted that considering the nature of the crime, a case is made out for enhancement of sentence and fine.

15. I have carefully considered the submissions. I have also perused the notes of evidence and the record of the case. The prosecution has examined 13 witnesses for establishing the guilt of the accused persons. There is documentary evidence on record in the form of panchanama, reports of the Chemical Analyser etc.

16. Since I am considering all the appeals together, it will be necessary to refer to the evidence of P.W.1 Ms.Smita alias Prachi Prakash Waradkar. She deposed that in the year 1982 she was residing at Mahim in a slum located behind the bus depot. She stated that she used to reside at the said place with her parents and her sister. She stated that her father, at the relevant time, was a photographer and used to start at 8.00 a.m.

for his duty and used to come back by 8.00 p.m. According to her even her mother used to undertake the work of stitching of clothes and earn livelihood. Her mother used to leave house around 9.00 in the morning and used to come back by 6.00 p.m. She stated that she has taken education upto 4th standard. After leaving her education incomplete, she was working as a maid servant doing domestic work. She stated that she was acquainted with Kalpana (P.W.4). She stated that she did not know the accused Nos.1 to 6. She stated that she had not seen any of the accused persons any time before. She stated that she did not remember whether Mahim Police had met her in the morning of 25th October 1982. She stated that she did not lodge any complaint to Mahim Police Station. She was confronted with her statement reduced into writing on 25th October 1982 before the Sub-Inspector of Mahim Police Station. She admitted her signature on the document and therefore, only the signature on the statement was exhibited and no other part of the statement was exhibited. At the instance of the prosecution, she was declared as a hostile witness and a permission was granted to the learned P.P to cross-examine the said witness. In the cross-examination, she stated that she did not know any of the accused persons. She stated that she did not

remember when she had gone to witness Garba dance in Navratri Festival. She stated that she was since married. She stated that she was unable to recollect if she had any love affair with accused No.1-Ramesh.

17. About the incident of 24th October 1982, she stated that at 5.00 p.m. she herself and Kalpana proceeded to building No.13 to see certain T.V.programme. She admitted that she along with Kalpana (P.W.4) assembled together at 9.15 p.m. and went to see Garba dance programme at Shirke colony. She stated that she saw accused Ramesh proceeding towards building No.17. She admitted that she was taken behind building No.23 by someone forcibly but she did not recollect his name. She further stated that in the passage between the southern wall of building No.23, she was forcibly pushed down by Ramesh and was trying to use force, but she ran away from the spot. In paragraph 11, she stated as under:

> "It is true that I was raped by some one during that night and on the said spot, but I cannot say who he was. Now says that I was not raped but I immediately run away as soon as I fell down. It is not true that Ranjan

had forcible intercourse with me thereafter I do not remember once Suresh deo also came there and after seeing him I run away from the spot."

She was shown certain clothes taken out from a bundle produced by the prosecution. She admitted that clothes might be her clothes. She was also cross-examined by the Advocate appearing for the Accused. As narrated earlier, only the signature of the said witness below her statement was exhibited and no part in the said statement was exhibited.

18. This takes me to the evidence of the important witness, namely Ms.Kalpana P.W.4. The entire case revolves around the deposition of Kalpana. Kalpana has been also cross examined at length. P.W.4 Kalpana identified the accused persons before the Court. She stated that the accused were sitting in the Court in the sequence of the names mentioned in the charge sheet. She stated the first names of all the accused before the Court. She stated that along with the accused persons, one Shyam was also their companion. She has stated that she knew the accused persons as all of them frequently visited the house of one Gotya who was staying in

Building No.9 in which she was staying. She narrated that 8 days prior to the incident, she along with her friend Smita had gone out to see a movie on television. Thereafter they proceeded to see Ramlila programme at Shivaji Park. She stated that while they were witnessing Ramlila programme, she found the Accused No.1-Ramesh and the Accused No.4-Raju standing behind them. She stated that thereafter accused no.1-Ramesh took Smita with him. She stated that since Smita had gone with Ramesh, she lost interest in Ramlila and therefore, she decided to return back to her home. According to her, the Accused No.4 Raju followed her upto Mahim and thereafter he stopped her. At that time Accused No.4 proposed that she should marry with him. However, she informed him that she was not willing to talk on the subject.

19. She stated that on the date of the incident at about 9.00 p.m., she alongwith Smita left their respective homes to see Garba programme in Police Quarters. According to Kalpana, both of them saw the programme upto 10.00 p.m. At that time Smita pointed out that the Accused No.1-Ramesh and Accused No.4-Raju were present. She told Smita that if the said two persons were present, it was not desirable to remain at

that place. Both of them accordingly started towards their home. When she looked back, while on the way back to her residence, she found the Accused No.1-Ramesh and Accused No.4-Raju were following her and Smita and therefore, both of them were very frightened. She described how both of them managed to hide below the staircase of the building No.17. According to her, the Accused no.1-Ramesh caught hold of the hand of Smita and took her away. She also described the manner in which Accused No.4-Raju took her to the terrace of Building No.17. The relevant part of what P.W.4 Kalpana has stated in her evidence reads thus:

> "3. Accused Raju took me thereafter to the terrace of building No.17. He asked me to sit by his side, and therefore I had to set by his side. Raju then told me that I should marry him but I refused his proposal and told him that I was regarding him as my brother and I had no intention to marry. Thereafter I started leaving the place but he held my hand and said that I should have sexual relationship with him. I resisted and I got up to leave for my home. Accused Raju forced me to sit and threatened that if I

cried, he would call his friends. As I was frightened I again attempted to leave the place, but in the meantime Ramesh came there alongwith the remaining accused. Out of fright I was going to raise a cry for help but accused Suresh took out his shirt and thrust into my mouth to silence me. Before this was done by Suresh, Ramesh had asked me in a threatening voice how and where I was going to flee. His words were "Kaha Jaogi Bulbul". After thrusting the shirt in my mouth Suresh had also pressed my mouth and nose also and I was feeling suffocated. Thereafter Raju and Bala held my hands and legs. Ramesh ordered them to push me down and I was forcibly made to by the accused though I was resisting. Ramesh then said that Raju was incapable to have sexual intercourse with me and therefore, he (Ramesh) would have the same with me first. Ramesh then removed all his clothes. At that time I was putting a skirt and a top. My skirt, the top and thereafter the under garments were removed. Then Ramesh had forcible sexual intercourse with me and

thereafter all the accused in succession raped me. There was one more assailant at that time and he had also committed rape on me but he is not present in Court today. He name was Shyam. Thereafter Ramesh ordered the remaining accused to lift me up and throw me down the terrace and accordingly all the accused lifted me up and threw me from the terrace, and fell down on the ground. On account of pain, fear and agony I yeilled "Deva Vachava" (O'God save me). My clothes were on the terrace itself in all probability. Accused No.5 Suresh had taken out his shirt and thrust it into my mouth. There are electric lights in our colony. There are electric lights in front of building No.17. On that day all the lights in building No.17 and the common passage were on and burning. So also were the street lights. There was adequate moon light on the date of the incident and therefore, I was in a position to identify the accused clearly and distinctly."

20. She stated that Accused No.4-Raju was wearing a

chocolate colour trouser and white shirt. She was shown the clothes of Accused No.4 Raju which she identified. She also identified her clothes which she was waring at the relevant time. She stated that her statement was recorded three days after the incident and that also in the hospital.

21. Kalpana was extensively cross-examined by the Advocate appearing for the Accused persons. In the cross-examination, she was unable to tell the full name of Gotya whom the accused persons used to visit. She stated that she was not introduced by the said Gotya or any of his family members to any of the visitors of Gotya and she came to know the names of the accused (except accused No.1-Ramesh and Accused No.4-Raju) because at the time of incident, their names were taken by the said accused persons. In response to a question in the cross-examination, she stated that every accused was asked to do some specific overt act in the said incident by the Accused no.1-Ramesh. She denied the suggestion that except Ramesh and Raju, she had not seen the other accused prior to the incident. She clarified that she had seen Accused Nos.2, 3, 5 and 6 many times prior to the incident as they used to frequently came to her building. She stated that she had seen all the

accused in the building on the date of commencement of Navaratri festival. She stated that she had no occasion to speak to accused no.4 Raju. She stated that she became semi-conscious before she was thrown down from the terrace and she regained consciousness after about 3 days. She stated that she was unable to tell when the accused persons were produced in the Hospital for identification.

22 She admitted that she had told Accused No.4 Raju when she was taken to Vivekanand park that her marriage was already settled. She stated that she was unable to say whether the accused No.4 Raju became unhappy when she turned down his proposal. She denied the correctness of the suggestion that she got angry with accused Raju only because he was asking her to marry with him. She stated that she left the place because she was not desirous of talking to accused No.4-Raju any more.

23. She was cross-examined on her allegation regarding the offence under section 376 of the said Code. She stated that one of the accused had held both her hands and the other accused held both her legs. She stated that both her wrists were held. She stated that

she was made to lie down and her ankles were held. She stated that her legs were spread by the accused persons and the accused persons who held her legs were by her side. She stated that she tried to free her hands and legs. At this stage it will be necessary to note a disturbing feature of this case. The learned trial Judge permitted the Advocate appearing for the Accused to ask certain questions which really ought not to have been allowed. A question was asked as to how much time the intercourse by each of the accused continued or lasted.

24. The prosecutrix was also cross-examined on the allegation of the prosecution regarding the offence under section 307 of the Penal Code. She stated that she had closed her eyes when the Accused threw her down. She stated that the words "Deva Vachawa" were uttered by her when she was thrown by the accused. She stated that she was constantly crying "Deva Vachawa" when she was falling down. She stated that after she fell down she cried "Deva Vachawa".

25. It will be necessary to refer to the evidence of the other witnesses examined by the prosecution. The

mother of the prosecutrix Kalpana by name Savitri Laxman Dhamankar was examined as P.W.2. She stated that in the year 1982 Kalpana might have completed 16 years of age. She stated that she was working as a vegetable vendor and she returned to her house on 24th October 1982 at about 9.00 p.m. She stated that when she returned to her house she found that Kalpana was not there. She was told by Kalpana's elder sister that she had gone to see Garba dance programme along with Smita (P.W.1). She stated that she was anxious and she could not sleep as she was worried. She stated that around 11.00 p.m. a boy visited her residence and told her that Kalpana had fallen down. She stated that name of the boy was Raju. She stated that thereafter she rushed to the place. She stated that some Police Officers were present at the place and she was told that her daughter has been taken to KEM Hospital. She visited KEM Hospital and when she found that her daughter was in unconscious condition. A capital was sought to be made out by the learned Counsel appearing for the Accused by contending that the person Raju named by P.W.2 was the Accused No.4. In examination-in-chief P.W.2 has not stated that the said Raju was the Accused No.4. It is pertinent to note that even in the cross-examination, a suggestion was not given to the said witness that the boy Raju referred by

her was the Accused No.4.

26. P.W.3 Ali Abdul Ali Barodawala stated that he was a resident of the building No.23 in Fishermen Colony at Mahim. He stated that on 24th October 1982 late in the night while he was reading, he heard a noise "thud" as if something had fallen on the ground from a considerable height. Immediately thereafter he heard that someone was crying. He immediately went down. He found that a girl had fallen and was crying "Deva Wachava" (save me, O God). He stated that the girl had fallen down near building No.17 which is opposite the Building No.23 in which he was residing. He started shouting for help and he was told that a girl had fallen down. He stated that he went to Mahim Police Station and informed Police about the incident. The Police accompanied him back to the spot. He stated that by the time he returned to the spot, the girl was unconscious. The Police took the girl to the KEM Hospital and he also accompanied the Police. He returned after sometime. He identified the prosecutrix Kalpana in the Court. In the cross-examination he stated that Building Nos.23 and 17 are identical in height. He stated that he did not notice that the people had gathered in the balconies. It was pointed out to him that he had stated before the

Police that he had noticed that some people had gathered in the balconies of the buildings. He stated that because of lapse of period of seven years, he was unable to recollect all the minute details.

27. P.W.5 Ali Akbar Abdul Latif is a panch witness. He is a witness to the panchanama of the spot where Kalpana was found lying near building no.17. He stated that there were some blood marks on the spot. He stated that there were some pieces of bangles scattered on the ground. He stated that a handkerchief used by ladies was also found on the ground. He stated that there was sufficient light from the surrounding street lights. He described the manner in which the Police seized the pieces of bangles and the handkerchief. He stated that sample of blood stained soil was also collected by the Police and the articles were sealed. He stated that thereafter he along with other panch witnesses and police went to the terrace of the building. He stated that there was a moon light and some light was available from reflection of the illumination of the surrounding buildings. He stated that the Police were carrying torch. He stated that in the light of the torch he saw an underwear which was identified by a young lady by stating that it was her sister’s underwear. A

Panchanama was drawn which was proved in his evidence. The same panch witness was called in the morning of 25th October 1982 to the Police Station. A girl was present whose clothes were seized under panchanama. He is also a panch witness to the panchanama under which the clothes of two accused persons were seized.

28. P.W.6 is one Shri Vasudev Aithu Devadiga. He was examined for production of the birth register maintained by Poddar Hospital at Mumbai. He brought the original birth register for the period of 1963 to 1966,. He proved entry at Sr.No.533 which showed that the mother of the prosecutrix Savitri delivered a female child on 5th September 1965.

29. Dr.Hemant Shantaram Kulkarni, P.W.7, was attached to the KEM Hospital as a House Surgeon at the relevant time. He produced the complete set of the original case papers of the prosecutrix Kalpana from page Nos.1 to 44 maintained by KEM Hospital. He described the injuries on the person of Kalpana as reflected from the case papers. According to him the following external injuries were noted by the Registrar:

"a) Crush injury on right elbow it was contused

lacerated wound 5"x3" in size along with front of elbow with compound dislocation lower end of humerus (exposed).

b) A contused lacerated wound of 1"x1/2" over the ulnar border. This injury was on right wrist and had swelling and tenderness.

c) Swelling, tenderness and deformity was noted on the upper third portion of the right thigh. No neurovescular damage was noted."

He stated that the X-ray examination revealed that there was dislocation of right elbow, comminuted fracture of radius and ulna and a fracture of shaft femur bone upper third right side. He stated that apart from above external injuries, there were external injuries in the form of switching premier dorsolumbar spine. It was revealed that the Prosecutrix had suffered a fracture of 12th rib on right side, compression fracture of 1st lumber vertebra and fracture interior remus of pubis on right side. He stated that the injuries which were found on the person of the prosecutrix Kalpana are possible if she was thrown from the terrace of a five storied building to the ground. He stated that the

contused lacerated wound on the elbow of the prosecutrix was possible if hands of the prosecutrix were tightly held and in her attempt to free herself they are rubbed against a rough surface. He stated that the CLW injury on the wrist is possible if that portion of body is rubbed against a hard or rough surface. He opined that if there was no immediate medical treatment available to the prosecutrix Kalpana, the injuries would have been fatal. In the cross-examination he stated that at the relevant time, he was doing post-graduation in surgery. He was asked various questions regarding the entries made in various registers and the signature of the doctors on the case paper maintained by the KEM Hospital.

30. P.W.8 Dr.Umesh Ranga Pai was the Casualty Officer in the KEM Hospital at the relevant time. He produced the original register of medico-legal cases maintained by the KEM Hospital. After referring to the entry of the prosecutrix Kalpana, he described the injuries on the person of Kalpana as noted in the register. In the cross-examination he stated that in the column regarding age of the patient, age of Kalpana was earlier written as 18 years.

31. P.W.9 Dr.Arun Biharilal Shah was working as Registrar at the relevant time of the General Surgery Department of the KEM Hospital. He stated that he examined the prosecutrix Kalpana on 25th October 1982 at about 2.00 p.m. By that time, she was already examined and treated in the casualty department by the Trauma Registrar. He noticed that the patient was not wearing any underwear and her skirt was stained with blood. He also noticed that there were suspected stains of semen on the skirt. He stated that on examination vagina, blood was seen at the vaginal orifice. The anterior border of vaginal orifice was lacerated. He stated that as soon as injuries on the vagina were noted, a Gynaecologist was called. There is hardly any challenge to the version of the said witness in the cross examination.

32. P.W.10 Dr.Dattatraya Madhusudan Nadkarni was working as a Registrar of the Psychiatric Department of the KEM Hospital at the relevant time. He stated that as per the general practice adopted by the Hospital in medico legal cases, a psychiatrist is called to examine the patient. He stated that when he examined Kalpana she was fully conscious but on account of mental shock she was talking irrelevantly. He stated that he noted

in the case papers that "No psychological stress factors at home". He found that before the incident that had resulted into depression, she was a normal girl and there was no history of hallucinatory behaviour nor of delusion etc. In the cross examination, P.W.10 stated that the patient was in such a depressed mood that she did not appear to have any interest to survive or remain alive.

33. Dr.Bhimrao Pundali Brahmane (P.W.11) was attached to the Police Hospital at Nagpada as a Medical Officer at the relevant time. He examined P.W.1 Smita. He stated that he examined P.W.1 on 25th October 1982 and after examination of the external genitals he found that prior to his examination, she was subjected to sexual intercourse and she was not used to sexual intercourse. He also deposed about examination of accused persons and he proved the certificates issued by him in evidence.

34. Dr.Ajanta Nitin Narvekar (P.W.12) was at the relevant time working as Registrar in the Gynaecological Department of the KEM Hospital. On 24th October 1982 she examined the prosecutrix Kalpana. She stated that there was minimal bleeding from vagina and there was

slight laceration of hymen. She stated that she could definitely say that the patient had sexual intercourse.

35. P.W.13 Bhagwantrao Bandu Patil was the Inspector of Police attached to Mahim Police station who acted as Investigating Officer. He stated that 00.45 hours, Sub-Inspector Shaikh and P.W.3 Barodwala informed him that a girl had fallen down and was lying in a serious condition in front of building No.17 in Fishermen Colony. He along with S.I. (Sub-Inspector) Shaikh, Barodawala and other Police staff rushed to the spot. He stated that he noticed that the girl was lying in an injured condition on the road between building Nos.17 and 23. He stated that the girl was unconscious and she had injuries on her right hand and left leg. He stated that he took the girl to KEM Hospital by a Police jeep. He stated that the girl was admitted to the KEM Hospital. In the meanwhile the mother of the girl Savitribai and her sister came to the Hospital with the help of the staff. They identified the said girl as Kalpana. He stated that by the time he went back to the spot, the Police had arrested Accused Nos.1 and 2. He has narrated the version of P.W.1 Smita. However, I am not referring to the portion of that evidence, as the same may not be admissible. He described the manner in

which the panchanama was made. He stated that on the spot where the girl was fallen down, the Police found pieces of red bangles and a handkerchief. He noticed a patch of blood on the spot. He stated that on the terrace of building No.17, the Police found pieces of bangles and an underwear. He stated that the said articles were seized. He identified the Articles in the Court. He stated that panchanama of the spot of occurrence as shown and pointed by P.W.1 Smita was prepared by S.I. Shaikh. He stated that he recorded the statement of P.W.1 Smita as a F.I.R. vide Crime No.796 of 1982. He stated that in the meanwhile he received information from KEM Hospital that the prosecutrix Kalpana was subjected to sexual intercourse. Therefore, in respect of offence against Kalpana he recorded F.I.R. of Sub-Inspector Shaikh and registered an offence vide C.R.No.797 of 1982. He stated that the statement of P.W.1 was recorded by S.I. Shaikh in his presence. He stated that S.I. Shaikh recorded statement of P.W.3 in his presence. He also described the manner in which the accused persons were arrested. He also stated that blood samples of the accused and the victims were collected and sent to the Chemical Analyser. He also pointed out that the various articles which were seized were sent to the Chemical Analyser.

36. In the cross-examination, he admitted that he was placed under suspension in March 1982. However, his suspension was revoked within a fortnight. He answered various questions regarding the location of the building No.17. In the cross-examination, the following question was sought to be asked by the Advocate for the Accused:

> Q. I call upon you to produce the F.I.R. of S.I. Shaikh on the basis of which C.R.No.797/82 was registered?

After an objection was raised by the learned P.P. to the said question, the learned Advocate for the Accused agreed to defer the said question. The witness admitted that he himself and S.I. Shaikh were together during the entire enquiry and investigation. He stated that he recorded the statement of S.I. Shaikh. He stated that when he reached the spot, he interrogated persons gathered there. He stated that he was unable to remember their names. He denied the suggestion that while interrogating occupants of building No.17, he got important clues from them but he deliberately did not record their statement. He stated that nobody was sleeping on the terrace when he went for investigation.

He also stated that torches were used for examining the surface of the terrace and the entire terrace was examined by the Police. He has denied the suggestion that the articles which were seized from the ground and the terrace were not sealed. He stated that both the First Information Reports were forwarded to the learned Magistrate. He however stated that he was not possessing the acknowledgements given by the Court in that behalf. He stated that he did not record the statement of the Constable who produced the clothes on the person of Kalpana from the KEM Hospital. He has also stated the manner in which he recorded the statement of prosecutrix Kalpana after getting endorsement from the Doctor. He stated that he did not obtain endorsement of the Doctor on the statement of Kalpana.

37. Apart from this oral evidence, there are medical certificates of the accused persons as well as the prosecutrix and reports of the Chemical Analyser. Exh.59 is one such report of the Chemical Analyser. It is noted in the said report that the skirt and shirt of Kalpana had innumerable blood stains ranging from 0.1 cm to 10 cms. spread at places. The report at Exh.57 shows that blood group of the prosecutrix Kalpana is

"A". The report at Exh.59 shows that the skirt and half shirt on the person of Kalpana was stained with blood of "A" group. The report also disclosed that on the skirt there were semen stain of blood group "A". Undergarment of the prosecutrix Kalpana had several stains of semen of blood groups A and B.

38. Before adverting to the submissions made by the learned Counsel appearing for the Accused, it will be necessary to refer to the decision of the Apex Court in the case of State of Punjab v/s. Gurmit Singh and others [(1996) 2 SCC 384). While dealing with the case of a sexual assault on a woman, the Apex Court held thus:

(a) The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

(b) Seeking corroboration of her statement for

relying upon the same, as a rule, in such cases amounts to adding insult to injury.

(c) While appreciating the evidence of a prosecutrix, Court may look for some assurance of her statement to satisfy its judicial conscience.

(d) While evaluating evidence of the prosecutrix, the Court should remain alive to the fact that in a case of rape no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her.

(e) The evidence of a victim of sexual assault stands almost on par with the evidence of an injured witness and to an extent is even more reliable. The evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding.

(f) A woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person’s lust and it is improper and

undesirable to test her evidence with certain amount of suspicion.

(g) The Courts shoulder a great responsibility while trying an accused on charges of rape. The The Court must deal with such cases with utmost sensitivity and should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.

(h) The Court must bear in mind that a girl in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down upon by the society.

(i) The Court should not sit as a silent spectator

> while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court. The Court must ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime, considering the fact that the victim has already undergone a traumatic experience and if she is made repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak.

39. In the case of State of Rajasthan v/s. N.K. [(2000) 5 SCC page 30), the Apex Court held that the failure of the prosecution to produce the witness to whom the prosecutrix narrated the entire story after rape is not fatal. The Apex court held that an unmerited acquittal does no good to the society and therefore, the Courts have to display a greater sense of responsibility and to be more sensitive while dealing with the charges of sexual assault on women.

40. The submissions of the learned Counsel appearing for the Accused will have to be appreciated in the light

of the well settled principles laid down by the Apex Court. If the examination-in-chief of the Prosecutrix is read, it is obvious that the Prosecutrix has narrated various facts leading to the commission of offence in a very coherent manner. Her evidence will have to be appreciated in the light of the fact that late in the night six accused had taken her to the terrace. She stated that Accused Ramesh removed all her clothes. She described that Ramesh had forcible sexual intercourse with her and thereafter all the other accused persons in succession raped her. She stated that after the said offence, the accused Ramesh ordered the remaining accused to lift her and to throw her down from the terrace. She stated that accordingly all the accused persons lifted her and threw her down from the terrace.

41. Criticism was made by the learned Advocate for the Accused of the evidence of prosecutrix Kalpana by pointing out that she has not ascribed any specific role to any accused person in alleged act of lifting her and throwing her down from the terrace. He submitted that it is not possible for the prosecutrix Kalpana to identify each and every accused and in fact she had committed a mistake while identifying the accused persons in Court. The prosecutrix has stated that she

knew the accused persons by face as they used to come to the place of one Gotya who was residing in the same building. She stated that at the time of the incident, the names of all the accused persons were specifically taken by Ramesh and they were asked to do some specific overt act. She denied the suggestion that except for accused Ramesh and Raju she had not seen any other accused prior to the incident. She had clearly narrated that after the offence under section 376 was committed, the Accused Ramesh directed all other accused persons to lift her and throw her down from the terrace. She had deposed that accordingly all the accused persons lifted her and threw her down from the terrace. Her version that she was shouting "Deva Wachava" has been sufficiently corroborated by P.W.3 Barodawala. The medical evidence sufficiently corroborates her version.

42. The learned Counsel for the Accused tried to create a doubt about the offence under section 376 being committed by all the accused persons by pointing out that there were no injuries on the private parts of the prosecutrix. He also submitted that the prosecutrix was unable to tell as to how the skirt was on her person when she was taken to the hospital.

43. At this stage it will be necessary to refer to the evidence of the Medical Officers which is on record. P.W.9 Dr.Arun Shah has stated that he examined the victim, he found that she was not wearing any underwear and her skirt was stained with blood. He also noted that there were suspected stains of semen on her skirt. He stated that on examination of vagina, blood was seen at the vaginal orifice and anterior border of vaginal orifice was lacerated. P.W.12 Dr.Ajanta Narvekar who is a Gynaecologist examined the patient on 24th October 1982 as well as on 28th October 1982. She stated that there were minimal bleeding from vagina and there was slight laceration of hymen. The oral and documentary evidence on record clearly shows that there was vaginal bleeding and there were injuries on the private parts of the prosecutrix Kalpana. It will be also necessary at this stage to refer to the another decision of the Apex Court in the case of Dastagir Sab and another v/s. State of Karnataka (AIR 2004 S.C. 2884). The Apex Court has referred to its earlier decisions and has held that the injury on the body of person of the victim of rape is not a sine qua non to prove the charge of rape. As indicated earlier, the report of the Chemical Analyser completely supports the prosecution which discloses that there were stains of semen on the skirt

as well as on the underwear of the prosecutrix. Considering the ghastly nature of the offence, it is very difficult to find fault with the prosecutrix if she was not able to precisely describe as to where her clothes were lying. There is nothing on record to discredit the version of prosecutrix Kalpana. Her version is most natural. There is absolutely no attempt to exaggerate in her evidence. The medical evidence referred to above is sufficient assurance or even a corroboration to her testimony.

44. The other aspect of the medical evidence would be relevant as offence under section 307 of the Penal Code has been alleged. A perusal of the medical certificate shows extensive injuries on the person of the prosecutrix Kalpana. It is also important to note the place where the prosecutrix Kalpana fell down. The place is at a considerable distance from the edge of the building. As stated earlier, the prosecutrix Kalpana deposed that she was constantly shouting "Deva Wachava" (O' God save me) after she was thrown down by the accused persons. P.W.3 Barodawala has also deposed to that effect. By no stretch of imagination it can be said that the prosecutrix Kalpana jumped on her own from the terrace. Use of the aforesaid words by her is

completely against the theory that she jumped from the terrace.

45. The evidence of P.W.7 Dr.Kulkarni is very relevant. In paragraph 5 of his deposition he has stated thus:

> "5. All these injuries which were found on the person of Kum.Kalpana are possible if she was thrown from the terrace of a five storied building on the ground."

In the same paragraph he has further deposed:

> "All these injuries were fatal in nature if there was no medical treatment immediately given to the patient."

The injuries on the person of the prosecutrix Kalpana are already referred to in earlier part of this Judgment. A perusal of the cross-examination of Dr.Kulkarni (P.W.7) shows that there is no serious challenge to the aforesaid opinion expressed by Dr.Kulkarni. The prosecutrix Kalpana has clearly stated that the Accused Ramesh directed all the Accused persons

to lift her and throw her down. It is not brought on record that any one else except accused were present on the terrace when Kalpana was thrown down. A perusal of the evidence of the prosecutrix Kalpana shows that all the accused persons on the direction of Ramesh lifted her physically and she was thrown down. As stated earlier, Dr.Kulkarni has stated that if timely medical treatment would not have been given, the injuries would have been fatal in nature. There is hardly any challenge to the said opinion expressed by Dr.Kulkarni. The terrace on which the offence under section 376 of the Penal Code was committed is above the fourth floor. It is obvious that the accused persons had full knowledge that by throwing the prosecutrix Kalpana from the terrace above 4th floor it was likely to cause death. In any case the accused persons knew that the act of throwing the prosecutrix Kalpana was so dangerous that it must in all probability cause such bodily injury as to cause death of the prosecutrix. Therefore, the offence under section 307 of the Penal Code has been proved. Section 34 of the Penal Code is also squarely applicable.

46. The learned Counsel for the accused submitted that the F.I.R. on the basis of which investigation was

started was not at all produced and proved before the Court. He submitted that there was no document on record to show that the F.I.R. was forwarded to the Magistrate. He submitted that the F.I.R. was recorded on the basis of the statement of S.I. Shaikh and the said Shaikh was not examined. He placed reliance on the decision of the Apex Court in the case of Ishwar Singh v/s. The State of U.P. (1976 Cr.L.J. 1883). He submitted that the examination of Sub-Inspector Shaikh was essential for unfolding the prosecution case and therefore, the failure to examine S.I. Shaikh who was very much available in Police service is fatal to the prosecution case. So far as S.I. Shaikh is concerned, it is obvious that he was not an eye witness to the incident. On the basis of his statement, the F.I.R. was recorded. In the present case I have already found that the evidence of the prosecutrix Kalpana was cogent, reliable and worthy of acceptance. Therefore, the failure to examine S.I. Shaikh will not be fatal to the case of the prosecution. So far as the non-production of F.I.R. is concerned, the registration of the F.I.R. is not in dispute. The registration of a F.I.R. is a condition precedent for investigation. The F.I.R. is not a substantive piece of evidence and failure to produce F.I.R. in the facts of the present case will

not vitiate the trial and the consequent conviction of the accused persons.

47. It is well settled law that some deficiency in the investigation will not affect the conviction, if evidence on record is sufficient to prove the guilt of the accused. In my view no fault can be found with the finding recorded by the learned trial Judge as regards the conviction of the accused persons under sections 307 and 376 of the Penal Code.

48. Before adverting to the question as regards the sentence, it will be necessary to refer to the important aspect as regards the manner in which the investigation was carried out and prosecution was conducted.

49. In the present case the F.I.R. of Sub-Inspector Shaikh was registered. The said F.I.R. is not produced. S.I. Shaikh is not examined. The Investigating Officer has not at explained as to why S.I. Shaikh was not examined or as to why a copy of a F.I.R. is not produced. The Investigating Officer could not produce any document to show that the F.I.R. was forwarded to the Magistrate in accordance with the law. In my view these are lapses on the part of the

Police machinery. It is necessary for the Commissioner of Police, Mumbai, to ascertain whether there is any dereliction of duty on the part of the Police Officer Shri Shaikh and Shri B.B.Patil. If he finds that there is dereliction of duty, it is for the Commissioner of Police to initiate appropriate action in that behalf.

50. So far as the Appeal against acquittal is concerned, the victim Smita i.e. P.W.1 has not supported the prosecution and the victim has turned hostile. Therefore there is not merit in the Appeal against acquittal. In the circumstances, the Appeal against acquittal is liable to be dismissed.

51. So far as the appeal preferred by the State for enhancement of sentence is concerned, I find that the Accused persons have been sentenced to undergo rigorous imprisonment for 7 years for offence under section 307 and a fine of Rs.500/- has been made payable. So far as offence under section 376 of the Penal Code is concerned the conviction is for 7 years. A fine of Rs.300/- each has been awarded. It is true that the offence is very grave and horrifying. A hapless prosecutrix was taken to the terrace of the building and raped and thrown down from the terrace above the fourth floor. The young

prosecutrix has suffered a number of serious injuries. There are scars of injuries all over her body. Her life has been completely ruined and shattered. Looking to the nature of crime committed, this is a fit case for enhancing the sentence. However, the offence has been committed in October 1982. The Accused are on bail. After such a long lapse of time, it will be very improper to enhance the substantive sentence. It is true that for no fault on the part of the prosecutrix, the Appeal remained pending in this Court for a long time. However, recourse will have to be taken to section 357 and the prosecutrix will have to be compensated. I have heard the Counsel appearing for the parties. The learned Counsel appearing for the Prosecutrix submitted that considering the trauma which is undergone by the Prosecutrix and considering the injuries sustained by her, this is a fit case where a total compensation of Rs.5 lakhs must be ordered to be paid to the prosecutrix.

52. In the midst of the Judgment, I had granted time to Shri Patil appearing for the Appellants to argue on this issue. He submitted that the fine is already awarded under the impugned Judgment and Order and in view of the decision of the Apex Court in the case of

Rachhpal Singh and another v/s. State of Punjab [(2002) 6 S.C.C. page 462] an order under section 357 cannot be passed at this stage. The trial Court has imposed fine of Rs.500/- each for offence under section 307 and a fine of Rs.300/- each for offence under section 376. As I have noted earlier, the offence is a most heinous crime against the society at large as it affects the dignity of a women. As indicated earlier this was a case for enhancement in sentence. However, long lapse of time is a factor which weighed in the mind of the Court. Therefore, this is a fit case where the fine will have to be substantially enhanced. Under section 376 of the Penal Code, even prior to the amendment in the year 1983, there was no upper limit provided to the fine. This is a case where after committing the heinous crime of rape, an attempt was made to commit murder by throwing the prosecutrix from the terrace above the 4th floor of the building and thus the offence under section 307 has been established. The offence under section 201 read with section 511 of the Penal Code is also thus established. While addressing himself on the question of grant of sentence, the learned Judge has noted that some of the accused are in Government service and some are doing private business. Considering the entire evidence on record and the gravity and seriousness of

crime, a fine of Rs.300/- each for the offence under section 376 imposed by the trial Court needs to be enhanced to Rs.25,000/- each.

53. Hence the following order:

i) Criminal Appeal No.37 of 1990 against the order of conviction is dismissed. The order of conviction and substantive sentence of imprisonment is confirmed.

ii) a) Criminal Appeal No.87 of 1990 (for enhancement of sentence) is partly allowed.

. b) The order of payment of fine passed by the trial Court is modified. It is directed that for the offence under section 376 of the Penal Code instead of fine of Rs.300/- each, fine of Rs.25,000/- each shall be payable by the Accused No.1 to 6. In default of payment of fine, Accused No.1 to 6 will suffer R.I. for a period of 13 months. Time of 10 weeks is granted to pay the fine amount.

. c) The fine amount, if deposited by the

Accused, shall be paid to the Prosecutrix Ms.Kalpana Laxman Dhamankar.

iii) The Accused persons are directed to surrender immediately.

iv) Rest of the impugned judgment and order including the order regarding issuance of show cause notice to P.W.1 is confirmed.

v) The Officer in-charge of Mahim Police Station will immediately take action on the basis of the writ of this order.

vi) Criminal Appeal No.88 of 1990 (against acquittal) is dismissed.

vii) Place the Appeals for direction on 18th December 2006 before the appropriate Court for reporting compliance.

viii) Copy of this order be sent to the Commissioner of Police, Mumbai.

Judge.